

Catholic University Law Review

Volume 60
Issue 2 *Winter 2011*

Article 6

2011

Cellphone Searches: Works like a Computer, Protected Like a Pager?

Byron Kish

Follow this and additional works at: <https://scholarship.law.edu/lawreview>

Recommended Citation

Byron Kish, *Cellphone Searches: Works like a Computer, Protected Like a Pager?*, 60 Cath. U. L. Rev. 445 (2011).

Available at: <https://scholarship.law.edu/lawreview/vol60/iss2/6>

This Comments is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized editor of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.

CELLPHONE SEARCHES: WORKS LIKE A COMPUTER, PROTECTED LIKE A PAGER?

Byron Kish⁺

When a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority.¹

Rapidly evolving technology threatens to stretch forty years of jurisprudence defining the limits of searches incident to lawful arrests beyond the scope Supreme Court holdings have contemplated.² Attempts by state and federal courts to fit the products of technological breakthroughs into particular classifications of property for the purposes of determining Fourth Amendment protections have yielded inconsistent case law that has, at times, made sensitive information vulnerable to exposure.³

It is well established that a police officer may, incident to a lawful arrest, contemporaneously search an arrestee and the area within the arrestee's immediate control without first obtaining a warrant.⁴ However, the Supreme Court has distinguished between items that are elements of the person⁵ and that are possessions within the arrestee's immediate control⁶ to determine the permissible scope of the search. At the scene of the arrest, it is reasonable for a police officer to search an item considered an element of the person and a

⁺ J.D., 2010, The Catholic University of America, Columbus School of Law; B.S.B.A., 2007, Central Michigan University. The author thanks Professor Mary Leary for her invaluable time, expertise, and guidance. The author also extends a special thanks to his friends and family for their constant support, love, and humor; especially, his wife Paula for all the little things she does to brighten the day and her unending patience on the long nights.

1. *New York v. Belton*, 453 U.S. 454, 459–60 (1981), *abrogated by Arizona v. Gant*, 129 S. Ct. 1710 (2009).

2. *See infra* Part I.B–C.

3. *See infra* Part I.C.

4. *See United States v. Rabinowitz*, 339 U.S. 56, 60–61 (1950) (discussing the history of searches incident to arrest), *abrogated by Chimel v. California*, 395 U.S. 752 (1969).

5. *See United States v. Edwards*, 415 U.S. 800, 805 (1974) (finding that subjecting the respondent's clothing to laboratory analysis was justified as a search incident to arrest).

6. *See United States v. Chadwick*, 433 U.S. 1, 14–15 (1977) (finding that a footlocker within police control was not within the immediate control of the arrestee), *abrogated by California v. Acevedo*, 500 U.S. 565 (1991).

possession within a person's immediate control.⁷ However, different principles apply for determining the reasonableness of a search later at the police station.⁸

Until recently, courts have interpreted this distinction with relative uniformity.⁹ Purses, luggage, and computers are generally considered possessions within the arrestee's immediate control and cannot be searched without a warrant once they are in the exclusive control of the police.¹⁰ Wallets, address books, and pagers are generally considered elements of the person and may be searched without a warrant within a reasonable time after the arrest.¹¹ Cellphones, however, do not fit neatly into either category, launching a debate among courts as to the proper way to classify them for purposes of the Fourth Amendment.¹² On the one hand, cellphones are small and can easily be carried in a pants pocket, coat, or on the belt.¹³ On the other hand, there may be a large amount of information contained in a cellphone similar to that found in brief cases and computers.¹⁴ Currently, eighty-seven percent of U.S. residents own a cellphone.¹⁵ With increasingly more Americans using cellphones, the need for a uniform standard is great.

7. See *id.*; *Edwards*, 415 U.S. at 805.

8. See *Chadwick*, 433 U.S. at 15.

9. See *infra* text accompanying notes 87–91.

10. See *infra* Part I.B.2.b.

11. See *infra* Part I.B.2.a.

12. See *infra* Part I.C.

13. The trend seems to be for cellphones to keep getting smaller. See *Gadgets Getting Smaller: Electrical Engineers envision Broad, Transformational Use of Flash Memory*, SCI. DAILY (Mar. 1, 2006), http://www.sciencedaily.com/videos/2006/0309-gadgets_getting_smaller.htm.

14. See *United States v. Park*, No. CR 05-375SI, 2007 WL 1521573, at *8 (N.D. Cal. May 23, 2007) (noting that a cellphone has “the capacity for storing immense amounts of private information”). Cellphones may have Bluetooth capabilities, removable memories, cameras, music players, family locators, text messaging, email, web, and global positioning system (GPS) navigation. See *List of Smartphones for Sale*, SPRINT, http://www.sprint.com/index_c.html (follow “Phones” hyperlink under the “Shop” tab) (last visited Nov. 19, 2010) [hereinafter SPRINT]; *Select a Phone or Device*, VERIZON WIRELESS, <http://www.verizonwireless.com> (follow “Smartphones” hyperlink under the “Phones & Devices” tab) (last visited Nov. 19, 2010) [hereinafter VERIZON WIRELESS]. Furthermore, sixty-one percent of “Generation Y” wants an increasing number of features on cellphones. See *New Study Shows Mobile Phones Merging New, Established Roles: Communicator, Shopping Aide, Entertainment and Research Hub*, KNOWLEDGE NETWORKS, http://www.knowledgenetworks.com/news/releases/2008/091808_mobilephones.html (last visited Nov. 19, 2010) [hereinafter *New Study*].

15. 6/12: *Cellphone Nation*, MARIST POLL (June 12, 2009), <http://maristpoll.marist.edu/612-cell-phone-nation/>. Indeed, sixty percent of Americans say they have their cellphones on them at all times. *New Study*, *supra* note 14. Sixteen percent of cellphone users carry a smartphone—also known as a personal digital assistant (PDA)—such as a Blackberry or iPhone. 6/12: *PDA's: Luxury or Necessity?*, MARIST POLL (June 12, 2009), <http://maristpoll.marist.edu/612-pdas-luxury-or-necessity/>. This percentage climbs if the consumer is a male (twenty percent), under forty-five years old (twenty-six percent), earns more than \$50,000 (thirty-one percent), or lives in the West (twenty three percent). *Table: Own a PDA?*,

This Comment discusses whether a cellphone should be classified as a possession within an arrestee's control or as an element of the person for purposes of searches incident to lawful arrest. It begins by discussing how the Supreme Court fashioned the exception to the Fourth Amendment search-warrant requirement and the dual rationales underlying its inception. Next, this Comment examines the distinction the Court draws between possessions within an arrestee's control and those found on the arrestee's person. It continues by considering state and federal cases that have defined what items are intrinsically associated with the person. This Comment then discusses how courts have struggled to classify cellphones, resulting in inconsistent holdings regarding the class of items in which cellphones best fit. It then considers the various arguments for classifying a cellphone as either a possession within an arrestee's control or as an element of the person.

This Comment demonstrates that cellphones are better categorized as possessions within an arrestee's immediate control than as elements of an arrestee's person. Then, it addresses the arguments in support of a new Fourth Amendment rule specifically for cellphones. This Comment ultimately concludes that cellphones are a possession in the arrestee's immediate control subject to the warrant requirement once they are within the exclusive control of the police. This approach best comports with the Supreme Court's current jurisprudence and adequately protects privacy interests in a world of emerging technology.

I. THWARTED BY TECHNOLOGY: THE SUPREME COURT'S STRUGGLE TO MAINTAIN BRIGHT-LINE RULES DEFINING THE SCOPE OF SEARCHES INCIDENT TO ARREST

The Fourth Amendment protects people against unreasonable governmental searches of their "persons, houses, papers, and effects."¹⁶ Pursuant to this protection, there is a strong preference for law-enforcement officers to obtain a search warrant before searching a container belonging to a person.¹⁷ This general rule is subject to a few exceptions, including the "search incident to arrest" doctrine.¹⁸ However, the Supreme Court has not applied this exception uniformly,¹⁹ which has led lower courts to attempt to determine whether a

MARIST POLL, <http://maristpoll.marist.edu/wp-content/misc/us090309/Technology/Have%20PDA.htm> (last visited Nov. 15, 2010). Seventy-one percent of teenagers owned a cellphone in early 2008. Amanda Lenhart, *Teens and Mobile Phones over the Past Five Years: Pew Internet Looks Back*, PEW INTERNET (Aug. 19, 2009), <http://www.pewinternet.org/Reports/2009/14--Teens-and-Mobile-Phones-Data-Memo.aspx>.

16. U.S. CONST. amend. IV; see also *Katz v. United States*, 389 U.S. 347, 353 (1967) (stating that the Fourth Amendment protects "people" and not "places").

17. *Arizona v. Gant*, 129 S. Ct. 1710, 1716 (2009).

18. *Id.*

19. *Chimel v. California*, 395 U.S. 752, 760 n.4 (1969).

container may be searched by the police after an arrest.²⁰ If the court determines that the container is an element of the arrestee's person, then the police may search the container within any *reasonable* time after the container is within their exclusive control.²¹ Alternatively, if the court determines that the container is a possession within the arrestee's immediate control, then the police may *not* search the container once it comes under their exclusive control.²²

A. Emerging Exceptions to the Fourth Amendment Warrant Requirement

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.²³

The scope of the Fourth Amendment protection from unreasonable searches is constantly evolving.²⁴ In *Katz v. United States*, the Supreme Court clarified for the first time that "the Fourth Amendment protects people, not places."²⁵ The Federal Bureau of Investigation (FBI) investigated Katz for violating federal law by making wagers over the telephone.²⁶ The FBI listened to Katz's conversations by placing an electronic-listening device on the outside of the

20. Compare *United States v. Monclavo-Cruz*, 662 F.2d 1285, 1289–90 (9th Cir. 1981) (concluding that a purse on an arrestee's lap was not an article of clothing and thus could not have been searched incident to arrest later at the police station), with *United States v. Passaro*, 624 F.2d 938, 943–44 (9th Cir. 1980) (characterizing a wallet as an element of the arrestee's person subject to search incident to arrest later at the initial place of detention).

21. See *United States v. Edwards*, 415 U.S. 800, 808–09 (1974) ("[T]he legal arrest of a person . . . does—for at least a reasonable time and to a reasonable extent—take his own privacy out of the realm of protection from police interest in weapons, means of escape, and evidence." (quoting *United States v. DeLeo*, 422 F.2d 487, 493 (1st Cir. 1970))).

22. See *United States v. Chadwick*, 433 U.S. 1, 15 (1977).

23. U.S. CONST. amend. IV.

24. See *Arizona v. Gant*, 129 S. Ct. 1710, 1718–19 (2009) (rejecting the state's argument that, based on precedent, a police officer is justified in searching a vehicle incident to arrest regardless of whether officer safety or preservation of evidence is implicated); *United States v. Robinson*, 414 U.S. 218, 235 (1973) (holding that a police officer may search both an arrestee and containers found on an arrestee as a search incident to arrest, regardless of the probability of finding evidence of the crime or instruments affecting officer safety); *Chimel*, 395 U.S. at 762–63 (holding that a search incident to arrest is an exception to the Fourth Amendment's warrant requirement, provided that the search is confined in scope based on officer safety or preservation of evidence); *Katz v. United States*, 389 U.S. 347, 351, 353, 358–59 (1967) (observing that the "Fourth Amendment protects people, not places," and therefore the surveillance of a conversation within a telephone booth requires a warrant regardless of whether there was a physical intrusion); *Olmstead v. United States*, 277 U.S. 438, 466 (1928) (requiring physical intrusion as a prerequisite to Fourth Amendment protection), *overruled by Katz*, 389 U.S. 347.

25. *Katz*, 389 U.S. at 351.

26. *Id.* at 348.

telephone booth that he used to make his bets.²⁷ In support of its argument that the search did not violate the Fourth Amendment, the government emphasized that it had not physically invaded the booth.²⁸ The Court rejected this argument and stated that the government's activities "violated the privacy upon which [Katz] justifiably relied while using the telephone booth."²⁹

Justice John Marshall Harlan's concurrence further extrapolated on the Court's statement that the "Fourth Amendment protects people, not places."³⁰ Specifically, Justice Harlan explained that Katz had "a constitutionally protected reasonable expectation of privacy" in the telephone booth.³¹ He synthesized this holding into a two-element test to determine whether a search had occurred: "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"³² Today, this test is the standard rubric under which courts determine whether a Fourth Amendment search has occurred.³³

Although the Court announced that a warrantless search is almost always unreasonable under the Fourth Amendment, the *Katz* Court also acknowledged that the general warrant requirement is subject to "a few specifically established and well-delineated exceptions."³⁴ Among these exceptions is a search incident to arrest.³⁵

27. *Id.*

28. *Id.* at 352.

29. *Id.* at 353. The Court's holding abandoned use of the trespass standard to determine whether a search occurred. *Id.* The Court also announced a strong preference for searches conducted after an independent magistrate issues a search warrant: "[S]earches conducted outside the judicial process . . . are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Id.* at 357 (footnote omitted).

30. *Id.* at 351.

31. *Id.* at 360 (Harlan, J., concurring).

32. *Id.* at 361.

33. See *Smith v. Maryland*, 442 U.S. 735, 742–43 (1979) (holding that because Smith likely had no actual expectation of privacy, nor was it one that society was willing to accept as reasonable, the use of a pen register by police to record the phone numbers dialed from Smith's home was not a "search"); *United States v. White*, 401 U.S. 745, 752 (1971) (plurality opinion) (noting that a person has no reasonable expectation of privacy in information voluntarily conveyed to a third party).

34. *Katz*, 389 U.S. at 357.

35. *United States v. Robinson*, 414 U.S. 218, 224 (1973).

B. The Supreme Court Attempts to Define the Search Incident to Arrest Doctrine

Since its recognition by the Supreme Court in 1914,³⁶ the scope of the search incident to arrest exception has been difficult to determine and has been clarified numerous times in the past ninety-seven years.³⁷ At first, the exception excluded only the search of the arrestee's *person* from the general warrant requirement.³⁸ However, in *Carroll v. United States*, the Court expanded the scope of the government's warrantless-search authority to include the *area* in the arrestee's control.³⁹ In *Marron v. United States*, the Court further expanded the area in which the police could search incident to arrest to include "all parts of the [arrestee's] premises used for the unlawful purpose."⁴⁰

Under this expanded standard, courts struggled to define and limit the permissible scope of a warrantless search under various circumstances for the next twenty-three years.⁴¹ In *United States v. Rabinowitz*, the Court narrowed the broad scope of searches permitted under *Marron* to the area within the possession or control of the person arrested.⁴² In 1969, the Court clarified the phrase "possession or control" in *Chimel v. California*.⁴³

36. See *Weeks v. United States*, 232 U.S. 383, 392 (1914); see also James J. Tomkovicz, *Divining and Designing the Future of the Search Incident to Arrest Doctrine: Avoiding Instability, Irrationality, and Infidelity*, 2007 U. ILL. L. REV. 1417, 1419, 1422–23 (2007) (stating that *Weeks* was the Court's first mention of the search-incident-to-arrest doctrine).

37. See *supra* Part I.A–B; see also *New York v. Belton*, 453 U.S. 454, 458 (1981) ("Although the principle that limits a search incident to a lawful custodial arrest may be stated clearly enough, courts have discovered the principle difficult to apply in specific cases."), *abrogated by Arizona v. Gant*, 129 S. Ct. 1710 (2009).

38. See *Weeks*, 232 U.S. at 392 (recognizing the government's right "to search the person of the accused when legally arrested, to discover and seize the fruits or evidences of crime").

39. See *Carroll v. United States*, 267 U.S. 132, 158 (1925) ("When a man is legally arrested for an offense, whatever is found upon his person or in his control which it is unlawful for him to have and which may be used to prove the offense may be seized and held as evidence in the prosecution.").

40. *Marron v. United States*, 275 U.S. 192, 199 (1927).

41. See, e.g., *United States v. Rabinowitz*, 339 U.S. 56, 66 (1950) (stating that the test "is not whether it is reasonable to procure a search warrant, but whether the search was reasonable"), *overruled by Chimel v. California*, 395 U.S. 752 (1969); *Trupiano v. United States*, 334 U.S. 699, 705–06 (1948) (holding that, although the arrest was valid, the subsequent contemporaneous seizure was not because the police had no justification for failing to obtain a search warrant), *overruled by Rabinowitz*, 339 U.S. 56; *Harris v. United States*, 331 U.S. 145, 149, 153–55 (1947) (upholding the warrantless search of Harris's entire apartment and the subsequent search of a sealed envelope marked "George Harris, personal papers" found inside a desk), *overruled by Chimel*, 395 U.S. 752; *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 358 (1931) (distinguishing the facts of the present case from those in *Marron* because the search was related to the execution of a search warrant, not a lawful arrest).

42. *Rabinowitz*, 339 U.S. at 62–64.

43. *Chimel*, 395 U.S. at 763.

1. Varying Interpretations of the Scope of a Search Incident to Arrest

a. Immediate Control

In *Chimel v. California*, the Supreme Court considered “whether the warrantless search of . . . [Chimel’s] entire house [could] be constitutionally justified as incident to [his] arrest.”⁴⁴ After the Court acknowledged the unsettled scope of this rule,⁴⁵ it found that the scope of a search incident to arrest “must be strictly tied to and justified by the circumstances which rendered its initiation permissible.”⁴⁶ The Court identified two justifications underlying the search-incident-to-arrest exception: officer safety and preservation of evidence.⁴⁷ As such, the Court limited the permissible scope of a search incident to arrest to “the area from within which [the arrestee] might gain possession of a weapon or destructible evidence.”⁴⁸ The Court held that the search of Chimel’s entire three-bedroom home, including his garage and attic, went beyond the area within Chimel’s immediate control, and therefore could not be justified by the search-incident-to-arrest exception.⁴⁹

b. Contemporaneous Search

In *Preston v. United States*, the Court noted that a search incident to arrest must be made contemporaneously with that arrest.⁵⁰ Subsequently, the Court created a bright-line rule to define temporal and spatial limits for when a search for evidence occurs contemporaneously with an arrest.

In *United States v. Edwards*, the Court considered whether a search of an arrestee’s clothing ten hours after his arrest was contemporaneous with his arrest.⁵¹ Police arrested Edwards on charges of breaking and entering, took him to jail, and placed him in a cell.⁵² Contemporaneous with this arrest,

44. *Id.* at 755. The police waited for Chimel inside his home with his wife’s consent. *Id.* at 753. When Chimel arrived, the police placed him under arrest in accordance with an arrest warrant. *Id.* Against his wishes and without a search warrant, the police searched Chimel’s entire three-bedroom house and seized several items over period of forty-five to sixty minutes. *Id.* at 753–54.

45. *Id.* at 756–62.

46. *Id.* at 762 (quoting *Terry v. Ohio*, 392 U.S. 1, 19 (1968)) (internal quotation marks omitted).

47. *Id.* at 763.

48. *Id.* As a practical matter, the Court stated that these two justifications for a search incident to arrest do not “routinely” justify searching rooms other than the one in which the person is arrested, and do not cover searches “through all the desk drawers or other closed or concealed areas in that room itself.” *Id.* Put another way, these areas are not within an arrestee’s “immediate control.” *Id.*

49. *Id.* at 768.

50. *Preston v. United States*, 376 U.S. 364, 367 (1964) (holding that a search incident to arrest is not reasonable if it “is remote in time or place from the arrest”), *abrogated by Arizona v. Gant*, 129 S. Ct. 1710 (2009).

51. *United States v. Edwards*, 415 U.S. 800, 801 (1974).

52. *Id.*

police discovered that Edwards's clothing may have contained evidence of the crime; however, because it was late at night, the police could not procure substitute clothing and were unwilling to leave Edwards nude overnight.⁵³ The next morning, the police purchased substitute clothing and took Edwards's clothing for analysis.⁵⁴ The Court began with a broad statement that it is "plain that searches and seizures that could be made on the spot at the time of arrest may legally be conducted later when the accused arrives at the place of detention."⁵⁵ It reasoned that requiring the police to have immediately stripped and searched Edwards's clothing and to have left him nude in his cell throughout the night was unreasonable.⁵⁶ Thus, the Court held that searches of clothing and possessions first seized *upon arrival* of the arrestee at the jailhouse may be held and searched at a later time.⁵⁷ However, the Court cautioned:

we do not conclude that the Warrant Clause . . . is never applicable to postarrest [sic] seizures of the effects of an arrestee. But we do think that . . . "[w]hile the legal arrest of a person should not destroy the privacy of his premises, it does—for at least a *reasonable* time and to

53. *Id.* at 801–02.

54. *Id.* at 802.

55. *Id.* at 803. The Court previously stated, in upholding a search of belongings taken to jail *by the arrestee*, that it does not perceive a difference, *when the accused decides* to take the property with him, for the search of it to occur instead at the first place of detention when the accused arrives there, especially as the search of property carried by an accused to the place of detention has additional justifications, similar to those which justify a search of the person of one who is arrested.

Abel v. United States, 362 U.S. 217, 239 (1960) (emphasis added).

The Court based its reasoning, in part, on twenty circuit court cases. *Id.* at 803 n.4. Eighteen of the cases involved arrestees who were searched only after they arrived at the jailhouse; many of these cases involved searching the arrestee's clothing, which required providing the arrestee with substitute clothing and thus, seemingly do not stand for a broad reading of *Edwards*. See *id.* at 803–08. The other two cases arguably support a broader reading of *Edwards*. In *Evalt v. United States*, a federal officer searched the arrestee's packsack upon arrest; after discovering what he believed was stolen money, the officer took the packsack into custody and later searched the money in the packsack for the serial numbers. *Evalt v. United States*, 382 F.2d 424, 427 (9th Cir. 1967). In *Malone v. Crouse*, the arrestee's suitcase was seized during arrest and was not searched until later; the court held that the search was lawful because it was contemporaneous with the arrest and did not occur at "another place" as prohibited by *Preston*. *Malone v. Crouse*, 380 F.2d 741, 743–44 (10th Cir. 1967) (citing *Preston*, 376 U.S. at 367). But see *United States v. Chadwick*, 433 U.S. 1, 15 (1977) ("Once law enforcement officers have reduced . . . personal property not immediately associated with the person of the arrestee to their exclusive control, . . . a search of that property is no longer an incident of the arrest."), *abrogated by California v. Acevedo*, 500 U.S. 565 (1991); *United States v. Schleis*, 582 F.2d 1166, 1171–72 (8th Cir. 1978) (en banc) (holding that police could not rely on the search-incident-to-arrest exception to justify searching the arrestee's briefcase after the briefcase was within the exclusive control of the police at the stationhouse).

56. *Edwards*, 415 U.S. at 805.

57. *Id.* at 807–08.

a *reasonable* extent—take his own privacy out of the realm of protection from police interest in weapons, means of escape, and evidence.”⁵⁸

c. Non-Contemporaneous Search

In *United States v. Chadwick*, the Court decided whether property seized at the time of arrest may be searched later at law enforcement’s headquarters when the property is under law enforcement’s exclusive control.⁵⁹ The FBI seized Chadwick’s 200-pound trunk during his lawful arrest.⁶⁰ The FBI then took the trunk to the Federal Building in Boston and, while under its “exclusive control,” opened it and discovered marijuana.⁶¹ The time between arrest and search was about an hour and a half.⁶²

Chief Justice Warren E. Burger, writing for the Court, stated that the overarching question under the Fourth Amendment was whether the search was reasonable.⁶³ The Court found that the search of the trunk was not justified as incident to a lawful arrest.⁶⁴ It acknowledged that a search incident to arrest is justified if the items were within the “immediate control” of the arrestee, regardless of “the probability that weapons or destructible evidence may be involved.”⁶⁵ However, the Court found that the search did not occur contemporaneously with the arrest and explained that

[o]nce law enforcement officers have reduced . . . personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy

58. *Id.* at 808–09 (emphasis added) (quoting *United States v. DeLeo*, 422 F.2d 487, 493 (1st Cir. 1970)); see *Schleis*, 582 F.2d at 1171 (“[A] close reading indicates that the Supreme Court was only referring to searches of effects still in the defendant’s possession at the place of detention, such as the defendant’s clothing.”).

59. *Chadwick*, 433 U.S. at 3. The Court declined to extend the rationales underlying the automobile exception—preservation of evidence and a lowered expectation of privacy in a vehicle—to the search-incident-to-arrest exception. *Id.* at 12–13. Although this Comment does not consider the automobile exception, further discussion may be found in Carol A. Chase, *Cars, Cops, and Crooks: A Reexamination of Belton and Carroll with an Eye Toward Restoring Fourth Amendment Privacy Protection to Automobiles*, 85 OR. L. REV. 913, 929–41 (2006).

60. *Chadwick*, 433 U.S. at 4.

61. *Id.* at 4–5.

62. *Id.*

63. *Id.* at 9. The Court noted that judicial scrutiny is a more reliable safeguard than the hurried judgment of police officers. *Id.* A neutral magistrate would be better able to set proper boundaries and provide better protection and assurance to the individual whose privacy is being intruded. *Id.*

64. *Id.* at 14.

65. *Id.* at 14–15.

evidence, a search of that property is no longer an incident of the arrest.⁶⁶

d. An Affirmance of the Dual Rationales Underlying the Search-Incident-to-Arrest Exception: Officer Safety and Preservation of Evidence

In *Thornton v. United States*, the Court decided whether an officer may search a vehicle incident to arrest if the individual was arrested by the officer that made first contact *after* the individual had left and was walking away from the car.⁶⁷ Upon arrest, police handcuffed Thornton and placed him in the back of a police car.⁶⁸ Then, the police searched his automobile and discovered a handgun.⁶⁹ The Court looked to the facts and holding of *New York v. Belton*⁷⁰ to decide that the search was constitutional under the search-incident-to-arrest exception.⁷¹ The Court construed the question in the case very narrowly and considered only whether the search was valid because the officer made first contact after the arrestee exited the car.⁷²

66. *Id.* The Court distinguished “searches of possessions within an arrestee’s immediate control” with “searches of the person” because “searches of possessions within an arrestee’s immediate control cannot be justified by any reduced expectations of privacy caused by the arrest.” *Id.* at 16 n.10.

67. *Thornton v. United States*, 541 U.S. 615, 617 (2004). The officer first made contact with the arrestee while he was in “close proximity, both temporally and spatially.” *United States v. Thornton*, 325 F.3d 189, 196 (4th Cir. 2003), *aff’d*, 541 U.S. 615.

68. *Thornton*, 541 U.S. at 618.

69. *Id.*

70. In *New York v. Belton*, the Court held that the scope of a search incident to arrest included the passenger compartment of the arrestee’s car and any containers found therein. *New York v. Belton*, 453 U.S. 454, 460 (1981), *abrogated by Arizona v. Gant*, 129 S. Ct. 1710 (2009). Although the Court stated that the arrestees may not have been able to reach the passenger compartment upon arrest, it held that the items in the passenger compartment were *generally* accessible and thus fulfilled the dual rationales articulated in *Chimel*. *Id.* The Court reasoned that a bright-line rule was necessary to ensure that police officers comply with the Fourth Amendment as they conduct their day-to-day duties. *Id.* at 458.

71. *Thornton*, 541 U.S. at 619–21. The *Thornton* Court noted that (1) the *Belton* Court placed no reliance on the location of the arrestee and (2) whether the police touched the arrestee while he was inside or outside the vehicle makes no difference in determining whether the vehicle—and by association the containers within the vehicle—are within his reach. *Id.* at 620–21.

72. *Id.* at 623. The Court stated that requiring officers to make a fact-intensive decision on whether the contact point was made before, during, or after a person left the vehicle would frustrate the bright-line rule *Belton* sought to create. *Id.*

Justice Antonin Scalia's concurring opinion was pointed and prophetic.⁷³ Justice Scalia sought to answer a much broader question about the constitutionality of the search. As he saw it, only three reasons could have justified the search in *Thornton*, and none of them were persuasive.⁷⁴ First, Justice Scalia dismissed the argument that Thornton might have escaped the police vehicle and retrieved a weapon or evidence from the car.⁷⁵ Second, Justice Scalia rejected the notion that "since the officer could have conducted the search at the time of arrest (when the suspect was still near the car), he should not be penalized for having taken the sensible precaution of securing the suspect in the squad car first."⁷⁶ The infirmity that Justice Scalia saw in this argument was the assumption that the search must take place regardless of whether the officer's safety was at risk or evidence may have been lost.⁷⁷

The final argument that Justice Scalia ultimately rejected was that the advantages of having a bright-line rule outweigh the few cases where a *Belton* search is unreasonable.⁷⁸ As Justice Scalia stated, the legitimacy of that reasoning depends upon "*Belton's* claim that the passenger compartment is 'in fact generally, even if not inevitably,' within the suspect's immediate

73. See *id.* at 625–32 (Scalia, J., concurring); see also *Arizona v. Gant*, 129 S. Ct. 1710, 1723–24 (2009) (holding that when an arrestee is handcuffed in the back of a police car, he can no longer reach his vehicle; thus, *Chimel's* dual rationales no longer apply, and a search of the vehicle incident to arrest is not reasonable under the Fourth Amendment). Although *Gant* adopted Justice Scalia's view that a broad interpretation of *Belton* allowing a search without *Chimel's* rationales went too far, the Court did not adopt Justice Scalia's view entirely: the Court retained allowing an officer to search the passenger compartment if the officer's safety is at issue. Compare *Gant*, 129 S. Ct. at 1721–24 (holding that the search of an automobile incident to arrest is only justified when *Chimel's* dual rationales are present or there is reason to believe evidence of the crime will be found in the vehicle), with *id.* at 1724–25 (Scalia, J., concurring) (advocating that the Court abandon *Chimel* as applied to automobile searches and hold that searches incident to arrest are reasonable "only when the object of the search is evidence of the crime for which the arrest was made, or of another crime that the officer has probable cause to believe occurred").

74. *Thornton*, 541 U.S. at 625 (Scalia, J., concurring).

75. *Id.* at 625–26 (stating that such a theory "calls to mind Judge Goldberg's reference to the mythical arrestee 'possessed of the skill of Houdini and the strength of Hercules'" (quoting *United States v. Frick*, 490 F.2d 666, 673 (5th Cir. 1973) (Goldberg, J., concurring in part and dissenting in part))). Justice Scalia noted that the government was only able to find seven cases within the previous thirteen years of an arrestee who attacked an officer after being handcuffed. *Id.* at 626. Of those cases, Justice Scalia noted that three "retrieved weapons concealed on their own persons," and three others "seized a weapon from the arresting officer." *Id.* Only one arrestee escaped from the back of a police car, and he fled into the woods, obtained a weapon from a house, and attacked the officer while still in handcuffs. *Id.*

76. *Id.* at 627.

77. *Id.*; see *id.* at 624 (O'Connor, J., concurring) ("As Justice Scalia forcefully argues, . . . lower court decisions seem now to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception justified by the twin rationales of *Chimel*" (internal citation omitted)).

78. *Id.* at 627 (Scalia, J., concurring).

control.”⁷⁹ However, common police practice requires an officer to restrain the arrestee and secure him in the back of the police car before searching the vehicle.⁸⁰ Thus, Justice Scalia found that applying *Belton* to this case “stretch[ed] [the search-incident-to-arrest exception] beyond its breaking point,”⁸¹ and the wise, honest approach would be to allow *Belton* searches whenever “it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.”⁸²

In *Arizona v. Gant*, Justice Scalia received part of what he sought: the Court held that *Belton* should be read narrowly to justify a search only when an “arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest.”⁸³ The Court rejected a broad reading of *Belton* based, in part, on the Court’s perception that lower courts were abusing its holding.⁸⁴ Furthermore, the Court stated that the government “seriously undervalue[d] the privacy interests at stake.”⁸⁵ What was created as a bright-line rule to guide police conduct resulted in inconsistent application by police and the courts.⁸⁶

2. Search Incident to Arrest: A Distinction Between Items that Are Elements of a Person and a Person’s Possessions

Edwards held that a search may be conducted at the police station within a reasonable time after an arrest so long as the search could have been conducted

79. *Id.* at 627–28 (quoting *New York v. Belton*, 453 U.S. 454, 460 (1981), *abrogated by Arizona v. Gant*, 127 S. Ct. 1710 (2009)).

80. *Id.* Justice Scalia further noted that “[s]ome courts uphold such searches even when the squad car carrying the handcuffed arrestee has already left the scene.” *Id.* at 628 (citing *United States v. McLaughlin*, 170 F.3d 889, 890–91 (9th Cir. 1999), *overruled in part by Gant*, 127 S. Ct. 1710).

81. *Id.* at 625. As one circuit court judge has put it,

[I]n our search for clarity, we have now abandoned our constitutional moorings and floated to a place where the law approves of purely exploratory searches of vehicles during which officers with no definite objective or reason for the search are allowed to rummage around in a car to see what they might find.

McLaughlin, 170 F.3d at 894 (Trott, J., concurring).

82. *Thornton*, 541 U.S. at 632 (Scalia, J., concurring).

83. *Gant*, 129 S. Ct. at 1723. The Court did not remove officer safety from the equation as Justice Scalia advocated in *Thornton* and *Gant*. See *Thornton*, 541 U.S. at 632 (Scalia, J., concurring); see also *Gant*, 129 S. Ct. at 1725 (Scalia, J., concurring) (“No other Justice, however, shares my view that application of *Chimel* in this context should be entirely abandoned.”). The Court’s holding that police may search a vehicle for evidence of the crime of arrest was based on the automobile exception and not the search-incident-to-arrest exception. See *id.* at 1719 (majority opinion).

84. *Gant*, 129 S. Ct. at 1718–19. The Court found that taken to its logical conclusion, such a reading “would . . . untether the rule from the justifications underlying the *Chimel* exception.” *Id.* at 1719.

85. *Id.* at 1720.

86. *Id.* at 1720–21. To illustrate the confusion, the Court cited several cases that, despite similar facts, reached contradictory conclusions. *Id.* at 1721 n.7.

at the time of the arrest.⁸⁷ However, *Chadwick* soon limited *Edwards*'s broad holding to bar searches of possessions once they come into the "exclusive control" of the police.⁸⁸ Lower courts have struggled to reconcile these two cases but have been consistent on what is considered an element of the person under *Edwards* and what is a possession under *Chadwick*.⁸⁹ The courts have been inconsistent, however, when they have tried to classify cellphones; some courts have held that they are elements of the person that can be searched within a reasonable time.⁹⁰ Other courts have held that they are possessions only searchable at the moment of arrest.⁹¹

a. Containers that Are Elements of the Person May Be Searched Within a Reasonable Time Following an Arrest

Generally, if a lower court finds that a container is an element of the person, then it will uphold the search of that container under *Edwards* as long as the search occurred within a reasonable time after it was seized.⁹² In *United States v. Passaro*, the Ninth Circuit held that the defendant's wallet was an element of his person.⁹³ The Ninth Circuit rested its conclusion on *Edwards*'s holding that a police officer may search an arrestee either at the moment of arrest or at the place of detention without needing to obtain a search warrant first.⁹⁴ The Ninth Circuit distinguished *Chadwick*'s factual situation from the facts

87. See *supra* Part I.B.1.b.

88. See *supra* Part I.B.1.c.

89. See *supra* Part I.B.2.

90. See *infra* Part I.C.

91. See *infra* Part I.C.

92. See *supra* Part I.B.1.b.

93. *United States v. Passaro*, 624 F.2d 938, 944 (9th Cir. 1980). The Ninth Circuit did not specify exactly how much time elapsed between the arrest and the subsequent search at the place of detention, though apparently it was less than twenty-four hours. See *id.* at 943. Police seized Passaro's wallet "from his person" after he arrived at an initial detention facility and photocopied a document in the wallet. *Id.* Initially, the Ninth Circuit quoted *Robinson*:

A police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick *ad hoc* judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search.

Id. (quoting *United States v. Robinson*, 414 U.S. 218, 235 (1973)). *Robinson* further stated that the dual rationales of *Chimel* "do[] not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect." *Robinson*, 414 U.S. at 235.

94. *Passaro*, 624 F.2d at 944 (citing *United States v. Edwards*, 415 U.S. 800, 803 (1974)). *Edwards* further stated that "[w]hile the legal arrest of a person should not destroy the privacy of his premises, it does—for at least a reasonable time and to a reasonable extent—take his own privacy out of the realm of protection from police interest in weapons, means of escape, and evidence." *Edwards*, 415 U.S. at 808–09 (quoting *United States v. DeLeo*, 422 F.2d 487, 493 (1st Cir. 1970)).

presented in *Passaro*.⁹⁵ Because the wallet in Passaro's pocket was an element of his person, the court applied *Edwards* and held that the search was reasonable even though it was conducted after the arrestee was detained.⁹⁶

In *United States v. Rodriguez*, the Seventh Circuit concluded that an address book found on the arrestee's person was an element of his person.⁹⁷ Rodriguez challenged the police search of his wallet and address book as unconstitutional because it took place at the sheriff's station after he was arrested at his workplace.⁹⁸ The court first cited another case in which it had previously upheld a search of an arrestee's wallet incident to arrest.⁹⁹ Further, under *Edwards*, the court concluded that the search was permissible because a search that could have been executed at the scene of arrest may be executed when the arrestee arrives at the station house.¹⁰⁰

Two years later in *United States v. Lynch*, a lower court analogized the warrantless search of a pager to previous courts' analyses of wallets and address books, thereby upholding the search.¹⁰¹ The court characterized the choice of approach as either controlled by *Chadwick*—which would require a warrant to search possessions found within an arrestee's immediate control after an arrest—or controlled by *Robinson*—which would dispense with the warrant requirement when the search is of an element found on the person and

95. *Passaro*, 624 F.2d at 944. The Court asserted that unlike the double-locked footlocker in *Chadwick*, which was "clearly separate from the person," the officers discovered the wallet "in the pocket of Mr. Passaro"; therefore, the court ruled that the wallet was "an element of his clothing [and thus] his person." *Id.* As such, Passaro's privacy interests, protected by the Fourth Amendment, gave way to the police's interests for a reasonable amount of time. *Id.*

96. *Id.* The Ninth Circuit also noted that in *Chadwick* the "personal effects [were] inside a double-locked footlocker," which showed the extent to which the arrestee had manifested an expectation of privacy. *Id.* (quoting *United States v. Chadwick*, 433 U.S. 1, 11 (1977), *abrogated* by *California v. Acevedo*, 500 U.S. 565 (1991)).

97. *United States v. Rodriguez*, 995 F.2d 776, 778 (9th Cir. 1993).

98. *Id.* at 777. Rodriguez was arrested at his workplace, searched for weapons, and then transported to the sheriff's station where he was subjected to a more thorough search. *Id.*

99. *Id.* at 778 (citing *United States v. Molinaro*, 877 F.2d 1341, 1346–47 (7th Cir. 1989)). In *Molinaro*, a DEA agent had spread out the wallet's contents on the trunk of his car while Molinaro was restrained in the back seat. *Molinaro*, 877 F.2d at 1346. The court noted that the Supreme Court had upheld searches incident to arrest in similar cases. *Id.* at 1346–47. Consequently, the court upheld the search, which revealed evidence of co-conspirators. *Id.* at 1347.

100. *Rodriguez*, 995 F.2d at 778 (citing *United States v. Edwards*, 415 U.S. 800, 803 (1974)).

101. *United States v. Lynch*, 908 F. Supp. 284, 288–89 (D.V.I. 1995). Soon after Lynch's arrest, federal agents seized his pager and searched for phone numbers. *Id.* at 286. Although the *Lynch* court reasoned that a pager was an element of the person, the Seventh Circuit reasoned that a search of a pager was justified under the search-incident-to-arrest doctrine. *United States v. Ortiz*, 84 F.3d 977, 984 (7th Cir. 1996). The Seventh Circuit noted that information on a pager is easily lost and a search is therefore justified by the need to preserve evidence. *Id.* ("Because of the finite nature of a pager's electronic memory, incoming pages may destroy currently stored telephone numbers in a pager's memory. The contents of some pagers also can be destroyed merely by turning off the power or touching a button.").

conducted within a reasonable time of the arrest.¹⁰² The court reasoned that the “exclusive control” test of *Chadwick* no longer applied because of *Belton*.¹⁰³ It held that a “pager was personal property immediately associated with the person . . . , as distinguished from . . . ‘personal property not immediately associated with the person of the arrestee.’”¹⁰⁴

b. Containers that Are Possessions Within an Arrestee’s Control May Not Be Searched Once They Come Under the Exclusive Control of Law-Enforcement Officers

In *United States v. Monclavo-Cruz*, the Ninth Circuit held that the search of a purse an hour after arrest was not a valid search incident to arrest.¹⁰⁵ The court interpreted *Edwards* narrowly because *Chadwick* confined the *Edwards* holding to searches of the arrestee’s clothing conducted at the police station.¹⁰⁶ In this vein, the *Monclavo-Cruz* court limited *Edwards* to searches of possessions that are an element of the person or clothing and further held that a purse does not fit into that category.¹⁰⁷

102. *Lynch*, 908 F. Supp. at 287. The court noted that many cases had relied on *Robinson* to hold that searches of wallets and address books were permissible as searches incident to arrest. *Id.* at 288. It also noted that, under *Edwards*, an arrestee’s privacy interest in the personal effect is destroyed “for at least a reasonable time and to a reasonable extent.” *Id.* (quoting *Edwards*, 415 U.S. at 808–09).

103. *Id.* (“The fact that the object is no longer at risk of being accessed by the defendant, because it is in the exclusive control of the arresting officers, is immaterial.” (citing *New York v. Belton*, 453 U.S. 454, 462 (1981), *abrogated by Arizona v. Gant*, 129 S. Ct. 1710 (2009))). *But see Gant*, 129 S. Ct. at 1718–19 (noting that numerous lower courts have read *Belton* too broadly).

104. *Lynch*, 908 F. Supp. at 289. The court noted that a California district court had also upheld a search of a pager incident to arrest. *Id.* (citing *United States v. Chan*, 830 F. Supp. 531, 535–36 (N.D. Cal. 1993)). The *Lynch* court noted, however, that *United States v. Chan* had distinguished *Chadwick* by reasoning that the search in its case took place only minutes after the arrest as opposed to the hour and a half in *Chadwick*. *Id.* (citing *Chan*, 830 F. Supp. at 535–36). This may have understated *Chan* because that court also held that “the pager was the product of a search of Chan’s person.” *Chan*, 830 F. Supp. at 536. It then broadly held that once an object is validly seized incident to arrest, any reasonable expectation of privacy an arrestee may have in it is destroyed. *Id.*

105. *United States v. Monclavo-Cruz*, 662 F.2d 1285, 1286, 1289–90 (9th Cir. 1981). After arresting Monclavo-Cruz, the immigration investigator took her back to the immigration office and conducted a search of her purse in her presence. *Id.* at 1286. The officer conducted the search without a warrant because he believed that searching her purse immediately at the place of arrest would be a security risk. *Id.* The officer recalled that Monclavo-Cruz’s purse “was either in her hand, on her lap, or on the seat of the car at the time of arrest.” *Id.*

106. *Id.* at 1289–90. The government argued that the court should follow a broad reading of *Edwards*: “[S]earches and seizures that could be made on the spot at the time of the arrest may legally be conducted later when the accused arrives at the place of detention.” *Id.* at 1289 (alteration in original) (quoting *Edwards*, 415 U.S. at 803).

107. *Id.*; see *United States v. Ortiz*, 84 F.3d 977, 983–84 (7th Cir. 1996) (noting that the lower court struck down the search of a computerized wristwatch—capable of storing an

Likewise, in *United States v. Schleis*, the Eighth Circuit held that a search of a briefcase after it came under exclusive control of the police was invalid because the briefcase was not an element of the arrestee's person.¹⁰⁸ The court first rejected the government's argument that *Chadwick* should only apply to large and less movable objects.¹⁰⁹ The government next argued that *Edwards* and *Chimel* would be eviscerated if the court found the search invalid.¹¹⁰ The court rejected this argument as well because *Chadwick* itself acknowledged and affirmed the *Edwards* and *Chimel* exceptions.¹¹¹ Furthermore, the court observed that "a close reading [of *Edwards*] indicate[d] that the Supreme Court was only referring to searches of effects still in the defendant's possession at the place of detention."¹¹² The court then noted that the test in determining whether an item within an arrestee's immediate control may be searched incident to arrest turned on whether the item was within the police officer's exclusive control.¹¹³ If it was a possession within the police officer's immediate control, then it could not be searched without a search warrant at the stationhouse.¹¹⁴

electronic address book—that took place the day following the seizure because it was not contemporaneous with the arrest).

108. *United States v. Schleis*, 582 F.2d 1166, 1171–72 (8th Cir. 1978) (en banc). The original panel decision held that the search of the wallet, clothing, pill bottle, and briefcase were all valid. *United States v. Schleis*, 543 F.2d 59, 61–62 (8th Cir. 1976), *vacated*, 433 U.S. 905 (1977). The panel decision, however, was vacated and remanded "for further consideration in light of *United States v. Chadwick*." *Schleis v. United States*, 433 U.S. 905, 905 (1977). Sitting en banc, the Eighth Circuit held that all of the above searches were valid except for the search of the briefcase. *Schleis*, 582 F.2d at 1168.

109. *Schleis*, 582 F.2d at 1170. The court reasoned that the contents of a briefcase are entitled to the same protection as those of a footlocker, and *Schleis* had demonstrated a reasonable expectation of privacy in the briefcase by locking and maintaining possession of it. *Id.* The court also noted that numerous other courts had applied *Chadwick* to items other than difficult-to-move footlockers, such as suitcases, attaché cases, and even a wallet. *Id.* at 1170 n.3.

110. *Id.* at 1170–71.

111. *Id.* at 1171.

112. *Id.* The court further noted that "[t]his reading of *Edwards* is strengthened by *Chadwick* where the Supreme Court distinguished searches of the person from searches of possessions within an arrestee's immediate control" and that "*Chadwick* clearly refrained from extending *Edwards* beyond searches of an arrestee's clothing." *Id.*

113. *Id.* at 1172. The court further noted in dicta that an item typically will be under the government's exclusive control at the moment of seizure. *Id.* The concurrence by former Chief Judge John R. Gibson took issue with this statement because he believed that such a broad interpretation "would practically eliminate the search incident to arrest exception to the warrant requirement." *Id.* at 1175 (Gibson, C.J., concurring). His intuition would prove correct; the Supreme Court in *Belton* invoked the same reasoning in holding that items do not come under the exclusive control of the police upon initial seizure. *New York v. Belton*, 453 U.S. 454, 461 n.5 (1981), *abrogated by Arizona v. Gant*, 129 S. Ct. 1710 (2009).

114. *Schleis*, 582 F.2d at 1172.

C. Courts Are Split over Whether a Cellphone Is an Element of the Person or a Possession Within the Arrestee's Control

Beginning in 2007, a large number of courts began to consider whether a cellphone was an element of the person or merely a possession.¹¹⁵ On January 26, 2007, the Fifth Circuit decided *United States v. Finley* and held that a cellphone was an element of the arrestee's person and not a possession within the arrestee's control.¹¹⁶ The court found that Finley had a reasonable expectation of privacy in the cellphone that had been provided by his employer.¹¹⁷ The court next considered whether the search-incident-to-arrest exception justified the warrantless search of the cellphone.¹¹⁸ It concluded that because the cellphone was discovered on Finley's person during his arrest, it was an element of his person, and the search was therefore valid.¹¹⁹

Soon after *Finley*, two district courts reached the opposite conclusion regarding cellphone searches.¹²⁰ In *United States v. Lasalle*, the court held that

115. Compare *United States v. Deans*, 549 F. Supp. 2d 1085, 1094 (D. Minn. 2008) (holding that when a cellphone is properly seized incident to arrest, "officers may also search any data electronically stored in the device"), *United States v. Dennis*, Crim. No. 07-008-DLB, 2007 WL 3400500, at *8 (E.D. Ky. Nov. 13, 2007) (holding that even though the defendant lacked the capacity to destroy the evidence at the time of the search, the search was valid because it was within his immediate control when he was arrested), and *United States v. Cote*, No. 03CR271, 2005 WL 1323343, at *6 (N.D. Ill. May 26, 2005) (analogizing cellphones to wallets and address books "since they would contain *similar* information," and holding the search of a cellphone valid even though it took place two and one-half hours after the arrestee was brought to the police station (emphasis added)), with *United States v. James*, No. 1:06CR134 CDP, 2008 WL 1925032, at *9-10, *10 n.4 (E.D. Mo. Apr. 29, 2008) (disagreeing with the magistrate judge that a cellphone search that took place thirty to forty-five minutes after the defendant's arrest would be covered by the search-incident-to-arrest exception, but finding that the search was authorized by a search warrant), and *State v. Isaac*, No. 101,230, 2009 WL 1858754, at *4-5, *7 (Kan. Ct. App. June 26, 2009) (holding that the search of a cellphone that took place more than an hour after the defendant was processed at a jail must be contemporaneous with the arrest because a cellphone is analogous to a computer).

116. *United State v. Finley*, 477 F.3d 250, 260 & n.7 (5th Cir. 2007). Finley was arrested during a traffic stop, and the police obtained a cellphone while searching his person. *Id.* at 254. Sometime later during police questioning, one of the officers began searching Finley's cellphone and discovered incriminating evidence. *Id.* at 254-55.

117. *Id.* at 258-59.

118. *Id.* The Fifth Circuit noted that, under *Robinson*, a full search of the person incident to a lawful arrest is *ipso facto* reasonable under the Fourth Amendment. *Id.* Finley was transported to another person's residence before the search took place, but the court found that this did not alter the outcome because the police had not completed the arrest. *Id.* at 260 n.7.

119. *Id.* at 260 & n.7. The court also distinguished *Chadwick* because it applies only to items that are not "immediately associated with the person." *Id.* at 260 n.7 (emphasis omitted) (quoting *United States v. Chadwick*, 433 U.S. 1, 15 (1977), *abrogated by* *California v. Acevedo*, 500 U.S. 565 (1991)). The court concluded that *Edwards*, not *Chadwick*, governed items found on a person. *Id.*

120. See *United States v. Park*, No. CR 05-375SI, 2007 WL 1521573, at *9 (N.D. Cal. May 23, 2007); *United States v. Lasalle*, Cr. No. 07-00032 SOM, 2007 WL 1390820, at *7 (D. Haw. May 9, 2007).

a search of Lasalle's cellphones that occurred while Lasalle was being booked three hours after his arrest was not a valid search incident to arrest.¹²¹ The court began its analysis by observing that *Robinson* and *Edwards* grant police broad authority to search incident to arrest.¹²² The court stated, however, that "pursuant to *Monclavo-Cruz*, *Edwards* applie[d] only to Lasalle's *person* or *elements of Laselle's clothing*."¹²³ The court held that the cellphones were not part of Lasalle's person, and the government conceded that they were not part of Lasalle's clothing.¹²⁴ Therefore, *Edwards* did not control the court's analysis.¹²⁵

The court turned to *United States v. McLaughlin* for the proposition that it should apply a "flexible standard[] such as 'roughly contemporaneous with the arrest' and within 'a reasonable time' after obtaining control of the object of the search."¹²⁶ Using this principle, the court held that the search of the cellphones was not contemporaneous given the time and distance separating the arrest and the search.¹²⁷

United States v. Park also addressed the validity of a warrantless cellphone search.¹²⁸ The court began by noting the distinct treatment of "searches of the person" under *Edwards* and "searches of possessions within an arrestee's control" under *Chadwick*.¹²⁹ Troubled by the sheer quantity of personal data that cellphones can hold,¹³⁰ the court refused to push the bounds of the

121. *Lasalle*, 2007 WL 1390820, at *7. At the time Lasalle was arrested, two cellphones were recovered; whether the cellphones were recovered from Lasalle's person was unknown. *Id.* at *2. Following a search of Lasalle's residence, a police officer began searching Lasalle's cellphones while he was being booked without consent or pursuant to a warrant. *Id.*

122. *Id.* at *3-4; see *supra* Part I.B.1.b.

123. *Lasalle*, 2007 WL 1390820, at *6 (emphasis added) (internal citation omitted).

124. *Id.*

125. *Id.*

126. *Id.* (quoting *United States v. McLaughlin*, 170 F.3d 889, 892 (9th Cir. 1999) (internal citation omitted), *overruled by Arizona v. Gant*, 129 S. Ct. 1710 (2009)). But see *Gant*, 129 S. Ct. at 1720-21 (citing *McLaughlin* as evidence that "contemporaneous to arrest" proved to be a difficult standard to apply).

127. *Lasalle*, 2007 WL 1390820, at *7. The court stated that the "relevant inquiry" was whether intervening events had separated the search spatially and temporally from the arrest and not simply how much time had passed between the two events. *Id.* at *6-7. The court also stated that concerns about officer safety could not justify the search because any risk to the officers had subsided by the time the search occurred. *Id.* at *7.

128. *United States v. Park*, No. CR 05-375SI, 2007 WL 1521573, at *1 (N.D. Cal. May 23, 2007). The officers making the arrest seized three cellphones owned by three of the five arrestees. *Id.* at *2. The affidavits of the arresting officers were vague as to when and where the search of the cellphones occurred. *Id.* at *3-5. It was not standard procedure to conduct inventory searches as to the contents of cellphones, so the search could not be justified as such. *Id.* at *2.

129. *Id.* at *6.

130. *Id.* at *8. The court was also troubled by the government's assertion that it could search an arrestee's laptop incident to arrest, given the amount of personal and private information that people store on their laptops. *Id.* The court found that the level of intrusiveness engaged in by

search-incident-to-arrest exception beyond *Chimel*'s original justification absent direction from the Supreme Court or the Ninth Circuit.¹³¹ The court concluded that due to the "quantity and quality of information that can be stored on a cellular phone," it should be characterized as a possession of the arrestee and not an element of his person.¹³²

Recently, the Supreme Court of Ohio, in *State v. Smith*, reviewed a case concerning whether police may search a cellphone incident to arrest.¹³³ Smith was indicted on one count of trafficking cocaine after police officers tapped a phone call between Smith and a woman who claimed that Smith was her dealer.¹³⁴ During the arrest, police found Smith's cellphone on his person and seized it.¹³⁵ Although it was unclear exactly when the search took place, the police accessed the cellphone's call record to verify that the conversation between Smith and the woman had occurred.¹³⁶

The Supreme Court of Ohio reversed the Ohio Court of Appeals's conclusion that the evidence discovered by searching Smith's cellphone had not been obtained in violation of Smith's Fourth Amendment rights.¹³⁷ First,

the government in searching a laptop or cellphone was far greater than when it searched "the contents of a lunchbox or other tangible object" because laptops and cellphones can "include diaries, personal letters, medical information, photos and financial records in one device." *Id.*

131. *Id.* at *8–9; *see also Gant*, 129 S. Ct. at 1723–24 (limiting *Belton* and *Thornton* to the original *Chimel* rationales with the extra exception applicable *only to automobiles* for reasonable belief that evidence of the crime will be discovered).

132. *Park*, 2007 WL 1521573, at *9. The court finished justifying its holding by distinguishing previous cases that held pagers and older cellphones to be elements of the person. *Id.* at *8 n.6 ("In this case, two of the searched phones were T-Mobile Sidekick IIs; in addition to address books, these phones feature e-mail accounts, text messaging, cameras, instant messaging [sic], Internet capability, and video caller ID. The Court takes judicial notice of these features." (citing *T-Mobile Sidekick® II*, T-MOBILE, <http://www.t-mobile.com/shop/phones/detail.aspx?tp=tb2&device=154e9bca-a74c-4299-99eb-48a1159c922b> (last visited Nov. 15, 2010)); *see also SPRINT*, *supra* note 14; *VERIZON WIRELESS*, *supra* note 14. The court distinguished the cases involving searches of pagers because there was no evidence in this case showing the need to prevent destruction of evidence and because searches of pagers "implicate[] significantly fewer privacy interests" than do searches of cellphones due to the difference in technology. *Park*, 2007 WL 1521573, at *9.

133. *State v. Smith*, 920 N.E.2d 949, 950 (Ohio 2009), *reh'g denied*, 921 N.E.2d 248 (Ohio), *cert. denied*, 79 U.S.L.W. 3016 (U.S. 2010).

134. *Id.* at 950–51.

135. *Id.* at 950.

136. *Id.*

137. *Id.* at 951, 956. The Ohio Court of Appeals held that *Finley* controlled, and therefore the search was constitutional. *Id.* at 950–51. The Court of Appeals first noted the differing analyses of *Finley* and *Park*, but viewed the *Finley* court as employing superior reasoning. *State v. Smith*, No. 07-CA-47, 2008 WL 2861693, at *5–7 (Ohio Ct. App. July 25, 2008), *rev'd*, 920 N.E.2d 949 (Ohio 2009), *reh'g denied*, 921 N.E.2d 248 (Ohio), *cert. denied*, 79 U.S.L.W. 3016 (U.S. 2010). The Court of Appeals also noted that the trial court suppressed pictures obtained from Smith's cellphone; thus, the broader privacy concerns of the *Park* court were not present. *Id.* at *8. The Court of Appeals approved the trial court's post-search suppression method to limit the search of Smith's cellphones into permissible areas. *Id.* Such approval implies that a

the court held that a cellphone was not a “closed container . . . subject to search upon a lawful arrest.”¹³⁸ According to the court, containers are “physical objects capable of holding other physical objects.”¹³⁹ Moreover, the storage capacity of modern cellphones renders them unlike containers.¹⁴⁰ Therefore, the court found cases analogizing cellphones to containers unpersuasive.

Without the container analogy to guide its analysis, the Supreme Court of Ohio determined whether the search of Smith’s cellphone was justified. Initially, the court recognized that cellphones are items normally carried on the person in which a person has a lowered expectation of privacy.¹⁴¹ Furthermore, cellphones contain information similar to that contained in an address book.¹⁴² Although both of these characteristics supported upholding the search, the court ultimately decided that the vast amounts of other information that people store in cellphones created a greater expectation of privacy.¹⁴³ Because the police could not claim that the search was necessary for officer safety or to preserve evidence, the court held that a warrantless search of a cellphone was unlawful under the Fourth Amendment.¹⁴⁴

II. THE BROADENING RIFT IN HOW COURTS SHOULD TREAT CELLPHONE SEARCHES FOLLOWING AN ARREST

Three approaches for dealing with cellphone searches have developed. The first approach, followed by a majority of jurisdictions, treats cellphones as elements of the person under *Edwards* and permits a search incident to arrest within a *reasonable* time after arrest.¹⁴⁵ The second approach, followed by a

cellphone is not just a container, but rather a container holding other electronic containers, some of which police are permitted to open, and some of which police are not.

Judge Mary E. Donovan dissented, arguing that cellphones should be considered possessions under *Chadwick*. *Smith*, 2008 WL 2861693, at *9–10 (Donovan, J., dissenting). Judge Donovan first noted that search incident to arrest is a narrow exception to the Fourth Amendment’s warrant requirement; as such, the burden of proof is on the government. *Id.* at *9. Judge Donovan also noted that, although the record is unclear as to where and when the search took place, the police were certain at trial that they searched the cellphone at the police station several hours after the arrest. *Id.* at *10. Judge Donovan found that the state did not meet its burden of proving that the search was contemporaneous or that exigent circumstances justified the search. *Id.* at *10–11. Because Judge Donovan found that the police had gained exclusive control over the cellphone, the search was no longer contemporaneous. *Id.* at *10. Judge Donovan agreed with the *Park* court that cellphones are more analogous to computers and that the dividing line between the two is shrinking. *Id.*

138. *Smith*, 920 N.E.2d at 953–54.

139. *Id.* at 954 (citing *New York v. Belton*, 453 U.S. 454, 460 n.4 (1981), *abrogated by Arizona v. Gant*, 129 S. Ct. 1710 (2009)).

140. *Id.*

141. *Id.* at 955.

142. *Id.*

143. *Id.*

144. *Id.* at 955–56.

145. *See supra* Part I.B.2–C.

minority of jurisdictions, considers cellphones possessions within the arrestee's control under *Chadwick* and prohibits warrantless searches after the phone comes under the police's exclusive control.¹⁴⁶ The final approach, developed by defense attorneys and civil liberty groups, and recently adopted in *Smith*, asserts that because electronic storage devices like cellphones and computers do not fit within the Supreme Court's definition of "container," privacy interests and public policy demand application of the warrant clause.¹⁴⁷

A. Is a Cellphone More Analogous to a Pager or a Computer?

Both pagers and computers store electronic information. But whether a cellphone is more like a pager or more like a computer has vastly different consequences for the search-incident-to-arrest doctrine: courts treat pagers as elements found on a person and computers as possessions within a person's immediate control.¹⁴⁸

There are three principal differences between pagers and computers. First, a pager is a small device designed to fit on a person's belt or in a pocket,¹⁴⁹ and a laptop computer typically exceeds fifteen inches measured diagonally.¹⁵⁰ Second, the difference in storage capacity between the two devices is enormous.¹⁵¹ Finally, police may be able to recover information from computers even after data has been deleted, but such recovery is significantly less likely with respect to the electronic information stored on pagers.¹⁵²

Unfortunately, cellphones are not readily analogous to either device. On the one hand, cellphones are small enough to fit on a person's belt or in his pocket.¹⁵³ On the other hand, cellphones are capable of storing enormous amounts of information.¹⁵⁴ Furthermore, most cellphone memories may be

146. See *supra* Part I.B.2–C.

147. See *supra* text accompanying notes 138–44.

148. A laptop is similar to a purse or briefcase, both of which are considered possessions in a person's control. See *supra* Part I.B.2.

149. See *United States v. Lynch*, 908 F. Supp. 284, 289 n.5 (D.V.I. 1995) (noting that the police seized the pager from the defendant's belt).

150. See, e.g., *Everyday Computing Laptop, Tablet, & Netbook PCs*, HEWLETT-PACKARD, www.hp.com (follow "Laptop, Tablet & Netbook PCs" hyperlink; then follow "Everyday Computing" hyperlink) (last visited Nov. 15, 2010).

151. Compare *United States v. Ortiz*, 84 F.3d 977, 984 (7th Cir. 1996) (noting the "finite nature of a pager's electronic memory"), and *United States v. Mercado-Nava*, 486 F. Supp. 2d 1271, 1278 (D. Kan. 2007) (discussing the limited memory of pagers), with *Everyday Computing Laptop, Tablet, & Netbook PCs* (listing laptops with substantial storage capacity).

152. See *Mercado-Nava*, 486 F. Supp. 2d at 1278; Adam M. Gershowitz, *The iPhone Meets the Fourth Amendment*, 56 UCLA L. REV. 27, 37 (2008).

153. See, e.g., *United States v. Finley*, 477 F.3d 250, 254 (5th Cir. 2007) (noting that the police discovered Finley's cellphone inside his pocket).

154. See Gershowitz, *supra* note 152, at 41; *supra* note 14 and accompanying text.

recovered even after being “deleted.”¹⁵⁵ This makes analogizing a cellphone to either device difficult. However, as technology advances, there is good indication that a cellphone is becoming more like a computer and less like a pager every day.¹⁵⁶

B. Should an Electronic Device Like a Cellphone Be Considered a Container?

The Supreme Court of Ohio ruled that any analogy between a modern cellphone and a container is inapt.¹⁵⁷ Two reasons support this argument. First, an electronic container does not match the Supreme Court’s definition of a container.¹⁵⁸ Second, cellphones today can contain vast amounts of information in numerous formats,¹⁵⁹ ranging from simple call logs to more sophisticated—and potentially more confidential—graphs, webpages, patient charts, and pictures.¹⁶⁰

However, the arguments for treating cellphones as containers are three-fold. First, although the Supreme Court has not considered whether an electronic device is a container, a plethora of lower courts have allowed the search of an electronic device incident to a lawful arrest.¹⁶¹ Second, a cellphone *contains*

155. See Hilary Hylton, *What Your Cell Knows About You*, TIME, Aug. 15, 2007, available at <http://www.time.com/time/health/article/0,8599,1653267,00.html> (discussing data recovery); see also How to Recover Deleted Text Messages from Mobile Phone—Retrieve Accidentally Deleted Text Messages, Contact Numbers and Other Data on Sim Card, SQUIDOO (Sept. 9, 2010, 7:45 PM), <http://www.squidoo.com/recoverdeletedtextmessages>. Not only can this information usually be recovered from a cellphone, but the cost of recovering it can be relatively inexpensive. *Id.*

156. See *United States v. Park*, No. CR 05-375SI, 2007 WL 1521573, at *8 (N.D. Cal. May 23, 2007); *State v. Smith*, No. 07-CA-47, 2008 WL 2861693, at *10 (Ohio Ct. App. July 25, 2008), *rev’d*, 920 N.E.2d 949 (Ohio 2009), *reh’g denied*, 921 N.E.2d 248 (Ohio), *cert. denied*, 79 U.S.L.W. 3016 (U.S. 2010).

157. See *supra* text accompanying notes 138–40.

158. *New York v. Belton*, 453 U.S. 454, 460 n.4 (1981) (defining a container as “any object capable of holding another object”), *abrogated by* *Arizona v. Gant*, 129 S. Ct. 1710 (2009); see also MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 269 (11th ed. 2003) (defining “container” as “a receptacle (as a box or jar) for holding goods”). None of the searches that the Supreme Court has considered concerning the search-incident-to-arrest exception included electronic devices. See, e.g., *Belton*, 453 U.S. at 456 (search of coat pocket); *United States v. Chadwick*, 433 U.S. 1, 15 (1977) (search of footlocker), *abrogated by* *California v. Acevedo*, 500 U.S. 565 (1991); *United States v. Edwards*, 415 U.S. 800, 801 (1974) (search of clothing); *United States v. Robinson*, 414 U.S. 218, 223 (1973) (search of cigarette pack).

159. See Bruce Schneier, *Recovering Data from Cellphones*, SCHNEIER ON SECURITY (Sept. 5, 2006, 9:38AM), http://www.schneier.com/blog/archives/2006/09/recovering_data.html; *supra* note 14.

160. See *Park*, 2007 WL 1521573, at *8 (discussing the personal nature of information on cellphones, like text messages, photographs, and e-mails). Furthermore, this technology is in the hands of the vast majority of Americans today, and more sophisticated cellphones such as smartphones are steadily increasing in market share. See *supra* note 15 and accompanying text.

161. See, e.g., *United States v. Ortiz*, 84 F.3d 977, 984 (7th Cir. 1996) (holding that the search of a pager is a valid search incident to arrest); *United States v. Mercado-Nava*, 486 F. Supp. 2d 1271, 1278–79 (D. Kan. 2007) (upholding the search of a cellphone to prevent the

information analogous to what is found in other objects subject to the container analysis.¹⁶² Finally, even if cellphones are not considered containers, the rationale that permits container searches—preservation of evidence—applies to cellphones.¹⁶³

C. Should Cellphones Be Treated as a Possession Within a Person's Control or as an Element of the Person?

Whether cellphones are treated as possessions under *Chadwick* or as elements of the person under *Edwards* is tantamount to deciding if a warrantless search conducted after the phone comes under the exclusive control of the police is constitutional.¹⁶⁴ Proponents assert numerous arguments for treating a cellphone as a possession within a person's immediate control rather than as an element of the person. First, police are not *entitled* to search items incident to arrest; rather, they are *allowed* to conduct a limited search pursuant to a narrow exception to the warrant requirement.¹⁶⁵ Second, the storage capacity of items normally considered to be elements of the person, such as wallets and address books, is very limited.¹⁶⁶ Conversely, items that have a larger storage capacity, like purses and brief cases, are deemed to be

destruction of evidence); *United States v. Parada*, 289 F. Supp. 2d 1291, 1303–04 (D. Kan. 2003) (upholding the search of a cellphone incident to arrest in order to preserve evidence); *United States v. Chan*, 830 F. Supp. 531, 534 (N.D. Cal. 1993) (analogizing the search of a pager to the search of a container). Furthermore, simply because the amount of information within the search may be great is not sufficient to justify eliminating a search entirely. See *Belton*, 453 U.S. at 455 (holding that a search incident to arrest in a vehicle may include the entire passenger compartment and any containers therein); *Chimel v. California*, 395 U.S. 752, 763 (1969) (holding that a search incident to arrest extends to the area within the arrestee's "immediate control," which may include the entire room where the arrest occurred and to containers within that room).

162. A cellphone contains information similar to a physical address book. *United States v. Cote*, No. 03CR271, 2005 WL 1323343, at *6 (N.D. Ill. May 26, 2005). A photograph on a cellphone is analogous to a physical picture, and a cellphone's calendar is analogous to a physical calendar. As such, it follows that a cellphone is simply a large container, but a container nonetheless. See *Park*, 2007 WL 1521573, at *8–10 (noting that a cellphone can store large amounts of information, and providing protection for the phone at the *police station* but not, by omission, at the scene of arrest).

163. See *State v. Smith*, 920 N.E.2d 949, 956 (Ohio 2009) (holding that a warrantless search of a cellphone is unconstitutional unless it is performed to preserve evidence or for officer safety), *reh'g denied*, 921 N.E.2d 248 (Ohio), *cert. denied*, 79 U.S.L.W. 3016 (U.S. 2010).

164. See *supra* Part I.B.2.

165. See *Thornton v. United States*, 541 U.S. 615, 627 (2004) (Scalia, J., concurring); see also *Chimel*, 395 U.S. at 762 (stating that a search "must be strictly tied to and justified by the circumstances which rendered its initiation permissible" (quoting *Terry v. Ohio*, 392 U.S. 1, 19 (1968) (internal quotation marks omitted))).

166. Cf. *Chan*, 830 F. Supp. at 535–36 (holding that a pager is an element of the person); *United States v. Lynch*, 908 F. Supp. 284, 289 (D.V.I. 1995) (noting that pagers, address books, and wallets are elements of the person).

possessions.¹⁶⁷ It follows, then, that a cellphone's vast storage capacity requires that it also be treated as a possession within a person's control.

On the other side, advocates who argue that a cellphone should be treated as an element of the person advance three points. First, a cellphone is small and often it appears on a person's belt or in a person's pocket—just like a wallet, address book, or pager—which suggests that it is an element of the person.¹⁶⁸ Second, although modern cellphones may contain vast amounts of information, the cellphones typically seized by police tend to be cheaper and less sophisticated.¹⁶⁹ Finally, trial courts can correct any police overreaching in suppression hearings.¹⁷⁰

However, proponents of the theory that a cellphone is a possession rather than an element of the person articulate numerous counterarguments. Initially, linking the lawfulness of a search to *where* a cellphone is located creates a fact-intensive question that eviscerates the bright-line rule favored by the Supreme Court.¹⁷¹ Moreover, even cheap and less-sophisticated cellphones have the potential to store large amounts of information, and police still seize phones that are not considered cheap or less-sophisticated.¹⁷² In addition, the Supreme Court has reaffirmed its commitment to limiting the exception to those situations where *Chimel*'s dual rationales exist.¹⁷³

167. See, e.g., *United States v. Monclavo-Cruz*, 662 F.2d 1285, 1289–90 (9th Cir. 1981) (holding that a purse is a possession and not an element of the person); *United States v. Schleis*, 582 F.2d 1166, 1170–72 (8th Cir. 1978) (en banc) (holding that a briefcase is a possession within a person's control and not an element of the person; therefore, any search requires a warrant once the briefcase comes under the exclusive control of the police).

168. See *United States v. Finley*, 477 F.3d 250, 254 (5th Cir. 2007) (noting that police discovered a cellphone in Finley's pocket after searching his person); *United States v. Wall*, No. 08-60016-CR, 2008 WL 5381412, at *1 (S.D. Fla. Dec. 22, 2008) (observing that a search of the arrestee's person yielded two cellphones); *supra* Part I.B.2.a. Conversely, larger items like purses, briefcases, and footlockers are considered possessions. See *United States v. Chadwick*, 433 U.S. 1, 9 (1977), *abrogated by* *California v. Acevedo*, 500 U.S. 565 (1991); *Monclavo-Cruz*, 662 F.2d at 1289–90; *Schleis*, 582 F.2d at 1172.

169. See Oral Argument at 05:47, *State v. Smith*, 920 N.E.2d 949 (Ohio 2009) (No. 2008-1781), available at <http://www.ohiochannel.org/MediaLibrary/Media.aspx?fileId=122113> (noting that drug dealers typically use unsophisticated cellphones in furtherance of their crimes). Thus, the concern that vast amounts of private information will fall into the police's zealous hands is not the case.

170. See Merit Brief of Amicus Curiae Ohio Prosecuting Attorneys Ass'n on Behalf of Appellee, *State of Ohio* at 6–7, *State v. Smith*, 920 N.E.2d 949 (Ohio 2009) (No. 2008-1781).

171. See *Thornton v. United States*, 541 U.S. 615, 623 (2004) (noting that an inquiry into where the defendant was located at the time the police made contact with him created a fact-intensive inquiry that frustrated *Belton*'s bright-line rule). But see *Arizona v. Gant*, 129 S. Ct. 1710, 1720–21 (2009) (refuting the myth of *Belton*'s bright-line rule).

172. See *supra* note 14 and accompanying text.

173. *Monclavo-Cruz*, 662 F.2d at 1289–90; *United States v. Park*, No. CR 05-375SI, 2007 WL 1521573, at *8 (N.D. Cal. May 23, 2007); see *supra* Part I.B.2.b–C. *Edwards* should be read narrowly to avoid the exception swallowing the rule. See *Chimel*, 395 U.S. at 762 (noting that searches incident to arrest should be “strictly tied to and justified by the circumstances which

III. SUPREME COURT CASE LAW AND PUBLIC POLICY: CELLPHONES SHOULD BE TREATED AS POSSESSIONS AND A NEW RULE GOVERNING ELECTRONIC CONTAINERS SHOULD NOT BE CRAFTED

A. Supreme Court Case Law Demonstrates that Cellphones Are Possessions Within an Arrestee's Control

1. Cellphones Should Be Considered Containers by the Courts

At its core, a container holds something. In this vein, a cellphone is a container in two respects. First, a cellphone can physically hold objects, for example, in a hidden compartment.¹⁷⁴ Second, and most pertinent to this Comment, a cellphone contains electronic information¹⁷⁵ that can be reproduced in physical form.¹⁷⁶ Therefore, a cellphone is simply a different type of container—one that contains information in an electronic format.¹⁷⁷

The storage capacity of a cellphone is similar to the storage capacity of a briefcase, a purse, a vehicle, or a room in a house, each of which are considered containers that may be searched contemporaneously incident to an arrest.¹⁷⁸ Therefore, the storage capacity of cellphones does not warrant their exclusion under the search-incident-to-arrest exception.

More importantly, it simply does not matter whether cellphones are considered containers. The driving force behind a search incident to arrest is not whether the item is a container but rather whether either of *Chimel's* dual

rendered its initiation permissible" (internal quotation marks omitted)); *see also Gant*, 129 S. Ct. at 1724 (rejecting the state's argument that, based on precedent, a police officer is justified in searching a vehicle incident to arrest regardless of whether officer safety or preservation of evidence is implicated).

Reading *Gant* as limiting searches incident to arrest to those situations when the dual rationales are present would not overrule *Edwards* because it can hardly be said that the police had exclusive control over the clothing that Edwards was still wearing. *See supra* Part I.B.1.b. A search under *Edwards*, taking place long after an arrestee has been separated from the object, may certainly present a situation where *Chimel's* rationales are no longer present. *See Park*, 2007 WL 1521573, at *8.

174. *See* Jesus Diaz *Cellphone's Secret Compartment Stores Bluetooth Headset, Drugs*, GIZMODO, <http://gizmodo.com/326570/cellphones-secret-com-artment-stores-bluetooth-headset-drugs> (last visited Nov. 15, 2010) (showcasing a phone with a secret compartment); *see also* *Cellphone Gun Video*, STRATEGY PAGE (May 4, 2006), http://www.strategypage.com/military_photos/cell_phone_gun_1.aspx (discussing guns used by criminals that look like cellphones); *Cellphone Stun Gun*, TBO-TECH, <http://www.tbotech.com/cellphonestungun.htm> (last visited Nov. 15, 2010) (selling stun guns disguised as cellphones).

175. *United States v. Fenley*, 477 F.3d 250, 259–60 (5th Cir. 2007) (finding a cellphone to be most analogous to a container); *United States v. Ortiz*, 84 F.3d 977, 984 (7th Cir. 1996) (reasoning that a pager could be a container of electronic information).

176. *See supra* note 14 and accompanying text.

177. Arguments that a cellphone does not fit within the Supreme Court's definition of a "container" are unpersuasive and, therefore, no new rule should be crafted prohibiting any warrantless search of a cellphone.

178. *See supra* Part I.B.

rationales—officer safety or preservation of evidence—is present.¹⁷⁹ If one of the rationales is present, then a warrant is not a prerequisite to a search.¹⁸⁰ If neither rationale is present, then further analysis is required concerning whether the search is a narrow *Robinson* search of the person at the time of arrest or whether another exception to the warrant requirement applies.¹⁸¹

2. *Cellphones Should Be Considered Possessions Within an Arrestee's Control*

a. *Cellphones Are More Analogous to Computers than Pagers and Should Be Treated as Possessions Within an Arrestee's Control*

Under current case law, a laptop computer is considered a possession to be protected from warrantless searches once it comes under the exclusive control of the police.¹⁸² Conversely, a pager is considered an element of the person subject to search at a reasonable time after arrest.¹⁸³ It is not the amount of information that cellphones can store that warrants greater protection, but the quality of information that warrants greater protection.¹⁸⁴ Cellphones contain information ranging from medical records to embarrassing photographs to business secrets, which can raise serious privacy concerns.¹⁸⁵ Given the capabilities of cellphones, the *potential* for discovering confidential information on a cellphone is greater than the potential of finding that kind of information on a pager.¹⁸⁶ The distinction between the capabilities of cellphones and pagers will only grow as technology improves to meet market demands.¹⁸⁷

The similarity in size and shape between cellphones and pagers hardly makes them analogous for purposes of the Fourth Amendment.¹⁸⁸ Moreover, the size difference between cellphones and laptop computers is diminishing

179. See *supra* Part I.B.1.

180. See *supra* Part I.B.1.

181. See *supra* Part I.A–B.1.

182. See *supra* Part I.B.2.b.

183. See *supra* Part I.B.2.a.

184. See Schneier, *supra* note 159.

185. See *id.*

186. See *United States v. Ortiz*, 84 F.3d 977, 984 (7th Cir. 1996); *United States v. Park*, No. CR 05-375SI, 2007 WL 1521573, at *9 (N.D. Cal. May 23, 2007).

187. See *State v. Smith*, 920 N.E.2d 949, 954 (Ohio 2009) (noting the disparity between modern cellphones and the cellphones of a decade ago), *reh'g denied*, 921 N.E.2d 248 (Ohio), *cert. denied*, 79 U.S.L.W. 3016 (U.S. 2010); see also *Park*, 2007 WL 1521573, at *8 (same); *supra* notes 14–15.

188. See *supra* Part II.A.

every year.¹⁸⁹ For instance, laptop computers today can be as small as ten inches measured diagonally and could easily fit inside of a purse.¹⁹⁰

Indeed, cellphones are becoming more like computers. They utilize web browsers and applications mirroring those found on computers.¹⁹¹ Because cellphones store information similar to computers and in similarly vast quantities,¹⁹² they should be considered possessions like computers.

b. Case Law Supports Treating Cellphones as Possessions Within an Arrestee's Immediate Control

Three reasons demonstrate why current Supreme Court case law prohibits a broad reading of *Edwards* and why cellphones should be protected as possessions under *Chadwick*. First, a search incident to arrest is a narrow exception to the Fourth Amendment's warrant requirement and must be tied to its justifications.¹⁹³ As a result, courts should not uphold searches executed outside of *Chimel*'s dual rationales.¹⁹⁴ Once a cellphone is in the exclusive control of the police, the evidence that may be found within is safely isolated from the arrestee, eliminating the need for the immediate search.¹⁹⁵

Second, the lack of specificity as to what constitutes a reasonable amount of time between the arrest and the search clashes with the bright-line rule that the Supreme Court has endeavored to construct.¹⁹⁶ *Edwards*'s rationale was based on case law that allowed an *initial* search at the police station.¹⁹⁷ It was not an invitation for the police to conduct searches at their convenience without any consideration of obtaining a search warrant.¹⁹⁸

Third, the fact that the police could have conducted a search at one point does not imply that they should be permitted to conduct a search at a later point. To paraphrase Justice Scalia in *Thornton*, searches incident to arrest are the exception to the rule, not a government entitlement; if sensible police

189. See *Mini Laptop, Tablet, & Netbook PCs*, HEWLETT PACKARD, www.hp.com (follow "Laptop, Tablet & Netbook PCs" hyperlink; then follow "Mini" hyperlink) (last visited Oct. 12, 2010) (showing computers as small as ten inches measured diagonally).

190. See *id.*

191. See SPRINT, *supra* note 14 (demonstrating features available on cellphones that are similar to those available on computers); VERIZON WIRELESS, *supra* note 14 (same).

192. See *supra* Part II.A.

193. *Chimel v. California*, 395 U.S. 752, 762–63 (1969).

194. See *Arizona v. Gant*, 129 S. Ct. 1710, 1723–24 (2009) (holding that when *Chimel*'s dual rationales no longer apply, a search incident to arrest is not reasonable under the Fourth Amendment).

195. Merit Brief of Amicus Curiae American Civil Liberties Union of Ohio Foundation, Inc., in Support of Appellant, Antwaun Smith at 7–8, *State v. Smith*, 920 N.E.2d 949 (Ohio 2009) (No. 2008-1781).

196. See *supra* Part I.B.1.b.

197. *United States v. Edwards*, 415 U.S. 800, 803–04 (1974) (holding that searching an arrestee's clothes after waiting to provide him with substitute clothing was reasonable).

198. See *id.* at 808–09; see also *supra* Part I.B.1.d.

procedures require an officer to separate an arrestee from his possessions—and thus eliminate the rationales underlying the exception—then police should separate the arrestee from his possessions and not conduct the search.¹⁹⁹ Because Supreme Court case law reveals that a cellphone is a possession within an arrestee's control, warrantless searches should be prohibited once police gain exclusive control of a cellphone.

B. Public Policy Demands that Cellphones Be Treated as Possessions Within an Arrestee's Control

In addition to Supreme Court case law, public policy supports treating a cellphone as a possession within an arrestee's immediate control. First, a test based on the location of a cellphone—whether found in the arrestee's pocket, on the arrestee's belt, in the arrestee's lap, on the next seat, in the glove compartment, or elsewhere—creates a fact-intensive inquiry that frustrates the Court's creation of bright-line rules.²⁰⁰ Such rules are in place both to guide police and to provide citizens notice as to the extent of their rights.²⁰¹

Second, treating cellphones as possessions under *Chadwick* best accommodates current and future technology. Cellphone technology is rapidly changing and young consumers are demanding increasingly more features such that the line between cellphones and computers is quickly vanishing.²⁰² In such a rapidly changing environment, neutral magistrates are in the best position to protect the legitimate expectations of privacy associated with new technology.²⁰³

Third, obtaining a search warrant prior to the search of a cellphone does not present a problem to police enforcement. While some information may be remotely alterable, the majority of information—such as call logs, text messages, calendars, and address-book information—may be preserved without any credible danger of destruction.²⁰⁴ Indeed, most information, even when “deleted” by a criminal, can be recovered through forensics in the same way as information found on a computer's hard drive.²⁰⁵ Once police gain exclusive control of a cellphone, there is little a criminal can do remotely that will endanger the evidence physically stored on the cellphone's memory.

199. *Thornton v. United States*, 541 U.S. 615, 627 (2004) (Scalia, J. concurring).

200. *See supra* Parts I.B., II.C.

201. *New York v. Belton*, 453 U.S. 454, 459–60 (1981), *abrogated by Arizona v. Gant*, 129 S. Ct. 1710 (2009).

202. *See supra* notes 14–15.

203. *See State v. Smith*, 920 N.E.2d 949, 955 (Ohio 2009) (stating that one has a higher expectation of privacy in a cellphone because of the amount and quality of the information it can hold), *reh'g denied*, 921 N.E.2d 248 (Ohio), *cert. denied*, 79 U.S.L.W. 3016 (U.S. 2010); *see also United States v. Chadwick*, 433 U.S. 1, 9 (1976) (discussing the role of magistrates), *abrogated by Gant*, 129 S. Ct. 1710.

204. *See supra* note 155 and accompanying text.

205. *See supra* note 155 and accompanying text.

Moreover, some cellphone information is backed up on a company server—like that utilized in Sidekick’s cloud memory—so this information could be physically recovered from the server’s hard drive.²⁰⁶

Finally, assuming *arguendo* that there was a credible risk of *remote* destruction of evidence, then the search of a cellphone may be justified under the exigent-circumstances exception to the Fourth Amendment.²⁰⁷ As a result, in such circumstances, the search-incident-to-arrest exception would be unnecessary.

IV. CONCLUSION

Technology is changing rapidly. New devices defy the rationales for old rules, demanding changes in the law. Such is the case with cellphones. Lower courts, without direct guidance from the Supreme Court, have crafted rules for cellphone searches based on interpretations and analogies from existing law.

Cellphones, however, do not fit into existing categories. The information stored in cellphones can be vast, and today’s phones can perform functions identical to modern computers. Although some lower courts have been quick to recognize these facts, many have not. This has created a split in the circuit courts that should be settled in favor of treating cellphones as possessions under *Chadwick*. Such a conclusion is supported by *Chimel*’s dual rationales, by current Supreme Court case law, and by public policy. A search of a cellphone incident to arrest must therefore be prohibited once the cellphone comes under the exclusive control of the police.

206. See Rob Pegoraro, *Sidekick Users See Their Data Vanish into a Cloud*, WASH. POST, Oct. 13, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/12/AR2009101203012.html>.

207. Although this Comment does not explore the exigent-circumstances exception, it should be noted that it is another exception to the Fourth Amendment warrant requirement and is argued when there is a threat that evidence will be lost. See Merit Brief of Appellee-State of Ohio at 11–14, *State v. Smith*, 920 N.E.2d 949 (Ohio 2009) (No. 2008-1781).

